IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 19, 2009

ERNEST CUNNINGHAM JR. v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-D-2560 Mark J. Fishburn, Judge

No. M2008-01313-CCA-R3-PC - Filed December 9, 2009

The Petitioner, Ernest Cunningham, Jr., was convicted of facilitation of the sale of under 0.5 grams of a controlled substance and of possession of more than 0.5 grams of a controlled substance with intent to sell or deliver, and the trial court sentenced him to a thirty-year effective sentence. This Court affirmed the Petitioner's convictions on direct appeal. *State v. Ernest Cunningham, Jr.*, No. M2005-01718-CCA-R3-CD, 2006 WL 1626655, at *1 (Tenn. Crim. App., at Nashville, June 2, 2006), *Tenn. R. App. P. 11 application denied* (Tenn. Oct. 2, 2006). The Petitioner filed a petition for post-conviction relief, amended by appointed counsel, that alleged that he received the ineffective assistance of counsel. Following a hearing, the post-conviction court dismissed the petition, and, after a thorough review of the record and applicable authorities, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

J. Chase Gober (on appeal) and Graham Pritchard (at post-conviction hearing), Nashville, Tennessee, for the Appellant, Ernest Cunningham, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Melissa Roberge, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Kathy Morante, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

In our opinion on the Petitioner's direct appeal, we recited the facts underlying his convictions as follows:

> On July 23, 2003, two Metropolitan Nashville Police Department detectives, Justin Fox and Danny Warren, were working undercover in an attempt to buy drugs from street dealers. Detective Warren was driving an unmarked car carrying Detective Fox as a passenger. The two officers were equipped with wireless radios, enabling other officers in the vicinity to monitor conversations and receive alerts by the undercover officers. At approximately 7:20 p.m., the officers saw three black males standing near a Chevrolet Beretta parked at the Trinity Inn. Detective Fox asked Timothy Davis, a co-defendant, for a "thirty," which is street terminology for $30 worth of crack cocaine. Davis told the officers to drive farther down the parking lot. The officers parked within fifteen to twenty yards of the Beretta. Davis went to the back of the Beretta and joined the defendant. Detective Fox watched the two men place something on the Beretta trunk and make a hand-to-hand transfer of an object which Detective Fox could not see to identify. Davis returned to the detectives' car and dropped three off-white rocks into Detective Fox's hand. Detective Fox handed Davis $30 of pre-copied bills of currency, which Davis took. An extra five-dollar bill was dropped inside the vehicle, and Davis retrieved it saying, "It'll be five more." After Davis accepted the money, the detectives gave a pre-arranged signal to the uniformed officers stationed in the vicinity. The uniformed officers then converged and assisted in making the arrests.
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> Detective Warren essentially confirmed the account as related by Detective Fox. He stated that he could observe the defendant and Davis conferring at the trunk of the Beretta after Detective Fox had made his request to buy drugs. Detective Warren said he could see hand movements by the two defendants as they stood side by side. After the arrests, Detective Warren noticed residue on the Beretta that appeared to be crumbs from crack cocaine.
>
> Sergeant Mackle was the supervisor of this operation and participated in the take-down phase. He stated that he had listened by radio to the conversation and received the signal to converge. Sergeant Mackle approached the defendant within five feet and demanded that he raise his hands. The defendant, instead, picked up currency from the back of the Beretta and threw it down. The defendant then picked up and threw a wadded piece of brown paper. Lieutenant Johnson retrieved the wadded paper, and it contained a large rock with several smaller pieces. Sergeant Mackle stated that the amount was typically used for resale as opposed to personal use. Lieutenant David Johnson confirmed that he retrieved the wadded paper in accordance with Sergeant Mackle's instructions.
>
> Officer Michael Dunn assisted in arresting the defendant and Davis. He testified that he recovered white rock substance from Davis's hand, right sock,

> and some that he had dropped, as well as the buy money paid by Detective Fox. Davis also had a crack pipe in his pocket. On cross-examination Officer Dunn affirmed that no drugs or buy money were found on the defendant's person.
>
> Agent Glen Glenn, a forensic chemist with the Tennessee Bureau of Investigation, testified that the two substances sold and recovered from Davis weighed .2 grams, and each tested as crack cocaine. The substance which the defendant discarded in the brown paper was also crack cocaine and weighed 1.7 grams.
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> The defendant, during voir dire, expressed his desire to waive his right to testify. No proof was presented by the defendant.

Cunningham, 2006 WL 1626655, at *1-2. The Defendant was convicted of one count of facilitation of the sale of under 0.5 grams of a controlled substance and one count of possession of more than 0.5 grams of a controlled substance with intent to sell or deliver, and this Court affirmed the convictions. *Id.* at *1.

B. Post-Conviction Hearing

The Petitioner timely filed a petition for post-conviction relief, amended by appointed counsel, in which he alleged he received the ineffective assistance of counsel. He asserted his trial counsel was ineffective for: (1) failing to thoroughly investigate his case and call witnesses; (2) failing to advise the Petitioner about the impact of the Petitioner's prior criminal record; and (3) failing to adequately prepare and represent the Petitioner at trial.

At the hearing on the petition for post-conviction relief, the following evidence relevant to the Petitioner's claims on appeal were presented: The Petitioner's trial counsel, ("Counsel"), testified he was appointed to represent the Petitioner, and he represented him from the inception of the case through sentencing. Counsel described his ability to communicate with the Petitioner as "[h]ot and cold at times" and not very effective. He said he had a hard time communicating the difference between the truth and how the State was going to approach the case. Counsel thought that his communication with the Petitioner affected the Petitioner's ability to make good decisions, which included refusing the guilty plea offer by the State, but did not affect Counsel's ability to mount a defense at trial. Counsel recalled that, at the Petitioner's request, he asked to cease his representation of the Petitioner.

Counsel testified he filed a discovery motion in the Petitioner's case, and he was sure he discussed with the Petitioner the State's response to the discovery motion although he had no specific recollection of such a discussion. Counsel also discussed with the Petitioner the State's plea offer of ten years, which the Petitioner declined. Counsel said that he determined that the Petitioner would be sentenced as a Career Offender if tried, and he conveyed this fact to the Petitioner multiple times. Counsel said, however, he never communicated this fact to the Petitioner in writing.

Counsel testified that the Petitioner seemed to think he had an adequate defense, and Counsel disagreed, thinking the Petitioner was facing a "rather strong case" against him. The Petitioner planned to assert that he was at the scene of this crime to fix his son-in-law's car, which would support the theory that the Petitioner was not involved in the drug transaction. Counsel contacted the Petitioner's son-in-law and engaged in a "rather disjointed conversation." Counsel felt the son-in-law would not make a good witness. The Petitioner also said his girlfriend/fiancé, Tommy Green, would support his version of the events. Counsel said, however, that Ms. Green's testimony would not be admissible because she did not have any direct knowledge of what happened.

Counsel testified that, to prepare for this trial, he reviewed the possible evidentiary issues, reviewed the notes from his sessions, reviewed the discovery, filed standard motions in limine, attempted to introduce the convictions of the co-defendant without the co-defendant being present, and prepared to cross-examine the State's witnesses. His strategy was to blame the crime on the Petitioner's co-defendant. Counsel also reviewed the State's list of the Petitioner's prior convictions, which the State would introduce if the Petitioner chose to testify. Counsel did not file a motion to prevent the State from admitting the Petitioner's prior convictions, because he and the Petitioner had already decided that the Petitioner would not testify. Counsel agreed that, because he did not file such a motion, the Petitioner could not appeal this issue.

Counsel testified that his theory of defense was that the officers were too far away to see what was happening and that the Petitioner's co-defendant was solely responsible for the sale. He did not, however, characterize this as a strong defense, and he agreed the evidence presented against the Petitioner was "pretty overwhelming." Counsel said that he presented no witnesses because he thought there was no credible evidence to be presented. He agreed that the Petitioner could have testified and given his account of the events but said the State would have "obliterated" him on cross-examination. Counsel conceded that the State referenced multiple times that the Petitioner had no valid reason to be at the location of the drug transaction. Counsel agreed that the Petitioner was with his co-defendant and an unidentified man when he was arrested.

Counsel recalled that, at the beginning of trial, he prepared, signed, and had the Petitioner sign, a "*Blakely*" waiver of a jury determining applicable enhancement factors and sentence. He said that the waiver reflected that the Petitioner could receive a minimum of ten years or a maximum of fifteen years. Counsel said he was "baffled" by these numbers because the Petitioner was a Career Offender so he could only receive fifteen years at sixty percent. Counsel said he filled the form out incorrectly, using the numbers for a C felony and not a B felony, and it should have reflected the correct numbers. Counsel said, though, that he communicated to the Petitioner his potential sentence of up to thirty years at sixty percent if convicted of the B felony and fifteen years at sixty percent if convicted of the other C felony charge. He agreed, however, that the only written documentation shown to the Petitioner reflected an inaccurate sentencing range. Despite this error, Counsel was confident that this incorrect document did not affect the

Petitioners correct understanding of his potential sentence, which he formed well before this document was drafted.

Counsel agreed that the State's notice of enhancement factors did not identify the classes of the Petitioner's prior felonies. Therefore, in order to determine whether the Petitioner was a Career Offender, Counsel went to the clerk's office and viewed the actual orders of judgment. Counsel said he did not have a "specific" recollection of doing this but only a "general" recollection.

Counsel testified that, after the Petitioner's trial but before his sentencing, he and the Petitioner met with the State's attorney. They discussed the Petitioner's potential sentence of forty-two years at sixty percent and the other indictments pending against him. State's attorney General Angelita Dalton agreed to thirty years, the minimum, if the Petitioner waived his sentencing hearing. The parties also orally agreed that General Dalton would agree to dismiss the other two indictments pending against the Petitioner. As part of this agreement, the Petitioner agreed to waive his right to appeal his sentence.

On cross-examination, Counsel testified he met with the Petitioner between at least five to ten times. The two discussed the State's plea offer of ten years, which he thought was a good offer considering the Petitioner's potential exposure. He communicated this offer to the Petitioner many times and told the Petitioner multiple times that the Petitioner qualified as a Career Offender. Additionally, he communicated to the Petitioner the potential sentence he faced if convicted of both charges. Counsel felt that, while the Petitioner understood the charges and his Career Offender status, the Petitioner did not seem to appreciate the risks associated with a verdict of guilty. Despite the risks, the Petitioner chose not to plead guilty and to demand a jury trial.

Counsel said, once the Petitioner decided to have a trial, the two discussed possible defenses, including that the Petitioner was there for a reason that had nothing to do with the drug deal. Counsel contacted the son-in-law, who the Petitioner said would corroborate his story, but Counsel got the impression the son-in-law would not make a very good witness because he seemed "a little disassociated." Counsel interviewed extensively the other potential witness, Tommy Green, who was the Petitioner's girlfriend/fiancé. Green told Counsel that the Petitioner had told her that he was at the scene to work on his son-in-law's car, but she had no personal knowledge of this. Therefore, Counsel thought her testimony would be inadmissible hearsay. Counsel said he did not think that evidence that the Petitioner was at the scene to work on his son-in-law's car would have successfully explained the facts presented by the State, so he chose not to focus on that defense.

Counsel also felt that the Petitioner would not make a good witness, and the Petitioner never expressed a desire to testify. Counsel said that the Petitioner's lack of desire to testify was based on factors other than his prior criminal record and that, even if his prior convictions were inadmissible, the Petitioner still would not have testified. There were no other potential witnesses.

On redirect examination, Counsel conceded that he probably never specifically asked the Petitioner if he wanted to testify. He explained that he thought the Petitioner testifying would have been a "horrible" idea, so he never pushed the subject. Counsel said he would not have discussed the *Blakely* waiver form with the Petitioner because, as the Petitioner was a Career Offender, the Petitioner could receive only one sentence if convicted.

On recross-examination, Counsel said he informed the Petitioner of his right to testify, but did not encourage him to testify.

Angelita Blackshear Dalton,[1] the assistant district attorney who prosecuted the Petitioner, testified that the defense counsel ("Counsel") was assigned to this case early on in the process. Judge Dalton said that there was a co-defendant in this case, and she attempted to settle the case with both the Petitioner and the co-defendant. She and the co-defendant successfully reached a plea agreement, and his case never went to trial. Judge Dalton said that she attempted to negotiate a plea agreement with Counsel in the Petitioner's case. The Petitioner had three different indictments for which Judge Dalton offered the Petitioner ten years as a Range III. The Petitioner was on parole at the time of the offense, so the offered sentence would run consecutively to the time he would serve for violating his parole. Judge Dalton made this plea offer some time after November 26, 2003.

Judge Dalton recalled that she realized the Petitioner was a Career Offender when she created a chart of his previous convictions. The chart did not reflect the class of felonies of the Petitioner's previous convictions but only recited each felony and its corresponding sentence. Judge Dalton determined that, according to her chart, were the Petitioner convicted of a B felony, he would receive thirty years at sixty percent because of his status as a Career Offender. She filed a notice of enhancement on January 12, 2005, which reflected that she considered the Petitioner a Career Offender. She agreed that the notice did not use the words "Career Offender."

Judge Dalton testified that after the Petitioner's trial but before his sentencing she and Counsel entered into negotiations about an agreed sentence that would also encompass the other indictments pending against the Petitioner. The Petitioner waived his sentencing hearing because they filed a stipulation agreement. Judge Dalton identified a *Blakely* waiver, which she did not specifically recall and noted that she did not sign and said the waiver was executed the first day of the Petitioner's trial. Judge Dalton agreed that, at the hearing during which the Petitioner waived his sentencing hearing, she told the trial court she wanted to make clear for the record that the Petitioner understood he was a Career Offender. When she did so, the trial court asked the Petitioner if he so understood, and the Petitioner said, "Yes, now I do."

[1] At the time of the hearing, Angelita Blackshear Dalton was a judge presiding over a Davidson County General Sessions Court.

On cross-examination, Judge Dalton testified that, as part of her agreement with the Petitioner, in exchange for waiving the sentencing hearing and appeal rights, she agreed not to seek consecutive sentencing. The State also agreed to allow the Petitioner to plead guilty in an unrelated misdemeanor case for a sentence of time served and to dismiss a second unrelated case, which was a B felony. Had the Petitioner not agreed to waive the sentencing hearing, the State was ready to go forward on both of these cases. Judge Dalton summarized the agreement by saying that in exchange for waiving the sentencing hearing the Petitioner received concurrent sentencing for the charges for which the jury convicted him and also avoided another potential thirty-year sentence for the B felony that the State dismissed.

Tommy Mai Green, the Petitioner's fiancé, testified that she had known the Petitioner for fifteen years and that the two were living together when he was arrested in connection with this case. She said the Petitioner had gone to work at a "plumbing job" earlier in the day with a friend named "Curtis," and he came home around 6:00 p.m. to get her keys so he could go to the Trinity Inn and retrieve her car. Green said that her son had taken her car to the Trinity Inn the night before and called her later to tell her that it would not start. Green's son said that a mechanic named "Black," who was staying at the Trinity Inn, said he could fix the car. When the Petitioner and Curtis arrived home from the plumbing job, Green told the Petitioner about the car and asked him to go get the car, and Curtis took the Petitioner to get her car. Green then received a phone call from someone informing her she should come and pick up her car because the Petitioner was being arrested. She got a ride to the Trinity Inn, and Black was standing next to her car. She paid him and left. Green testified she did not see the Petitioner or Curtis when she arrived at the Trinity Inn.

Green testified that she called Counsel frequently but rarely was able to reach him. She spoke with him in person at the courthouse, but he never asked her about any information she had related to these events. She explained she did not insist on testifying because she was unaware that so insisting was an option. Green said she did not personally know the Petitioner's co-defendant, and she had never seen the two together.

On cross-examination, Green conceded that the Petitioner had been arrested on three separate occasions on three separate dates close in time to his arrest in this case. She said she thought she remembered this arrest clearly because it occurred on a weekday, but she conceded that his other arrests may have also occurred on weekdays. She further conceded that she was unsure whether the Petitioner going to have her car fixed occurred the day of the Petitioner's arrest in this case.

Green testified that she lent her car to her son so that he could go to Trinity Inn and engage in sexual activity with a woman named Tiffany. She said she did not know Tiffany's last name or how to find her. When her son called her and said the car was no longer working, she learned that the alternator needed to be replaced. Green said that her son brought her keys back to her before the Petitioner came to retrieve the keys. When asked how Black got her keys to fix her car, she said that the Petitioner brought the keys to Black. Green did not recall how long after the Petitioner retrieved her keys he got arrested but agreed it may have been 7:20 p.m.

when he was arrested. She agreed her testimony was that the Petitioner retrieved her keys at 6:00 p.m. and brought them to Black at the Trinity Inn where Black successfully changed her alternator before the Petitioner was arrested at 7:20 p.m. Green agreed she was not at the Trinity Inn during this time, and she did not see whether the Petitioner was dealing drugs. Green conceded that she may have discussed with Counsel her recollections of these events but she did not recall so doing.

The Petitioner testified he and Counsel did not get along because he felt Counsel was not adequately investigating his case because he did not interview witnesses who were at the scene. The Petitioner said he gave Counsel pictures of Green's car, which showed wires missing from the alternator. He wanted Counsel to discuss this with the mechanic. The Petitioner said that, while he was released on bond, he met with Counsel at court dates. After the Petitioner was arrested again and incarcerated, Counsel still met with him only during his court dates. During these brief meetings, which the Petitioner said lasted no more than five minutes, the Petitioner stressed his non-involvement, and he urged Counsel to interview the witnesses to confirm this. Counsel told him that he would have an investigator interview the witnesses and photograph the scene, but he never did. Instead, Counsel continually told the Petitioner that he needed to accept the plea offer by the State.

The Petitioner testified Counsel said the State had offered the Petitioner five years in exchange for his guilty plea, and the Petitioner refused this offer. The Petitioner said Counsel never showed him his potential range of punishment and told him that he may receive ten years if convicted. The Petitioner said Counsel never told him he faced thirty years at sixty percent. He said, had he been so informed, he would have taken the State's second offer, which was ten years in exchange for his plea of guilty.

The Petitioner testified he never read the *Blakely* waiver form, and Counsel never explained it to him. He said the only thing the two discussed about his prior convictions were that they would be admissible against him if he testified at trial. The Petitioner said Counsel never informed him that Counsel could file a motion seeking to exclude the convictions. Counsel told him that he would receive a sentence of forty to sixty years if his prior convictions were admitted and the judge found him guilty. The Petitioner thought that if he did not testify his sentence would not be in the forty to sixty year range.

The Petitioner said he was willing to testify but did not do so because he thought that his prior convictions would be admissible against him. Further, Counsel told him that, if he testified, the Petitioner's co-defendant would testify and implicate the Petitioner, placing all of the responsibility for the drugs sale on the Petitioner. Finally, the Petitioner did not testify because he did not feel comfortable with Counsel's representation.

The Petitioner expressed dissatisfaction with the frequency and duration of his meetings with Counsel. The Petitioner recounted that he and Counsel briefly met the morning of trial and that it was his understanding at the time that Counsel was going to call Green to testify. He said

that Green also understood that she would be a witness on the Petitioner's behalf. Counsel, however, never called her to testify.

The Petitioner testified that he only learned of his sentence of thirty years on the day of sentencing when Counsel approached him with two offers from the State to an agreed sentence if the Petitioner waived his right to appeal and his right to a sentencing hearing. In the first offer, the State would agree to a twenty-year sentence if the Petitioner agreed not to appeal his case at all. In the second offer, the State would agree to a thirty year sentence, and the Petitioner could appeal his sentence. The Petitioner said he chose the second offer because he understood that he could receive a sentence of forty to sixty years.

The Petitioner testified that, had he been given the opportunity to explain to the jury what had happened the day of this incident, he would have said that he went to the Trinity Inn with Curtis Strong the plumber truck driver, who was a friend of his, to retrieve Green's car. When he arrived at the motel, he looked for the mechanic, who was a man nicknamed "Black" that he had never met before. He saw a man fitting Black's description and approached him to ask if he was Black. The man said "yes," and the two went toward Green's car together. While they were looking under the hood, a man he had never seen before, who he later learned was co-defendant Davis, approached them to inquire as to the problem. As co-defendant Davis was standing with them, two men in a car approached and yelled to Davis. Davis left to talk with the two men, came back to where the Petitioner and Black were standing, and then went to meet with the two men in the car. The Petitioner then saw Davis "wrestling" with the two men, and the Petitioner thought Davis was being robbed. The police then passed the Petitioner and apprehended Davis. An officer then approached the Petitioner with his weapon drawn, which surprised the Petitioner. He patted down the Petitioner and asked him questions about the mechanic, Black. Black told the officer that he just got a job working as a maintenance man cleaning up the motel lot, and he gave the police permission to search his room at the hotel. The police questioned Strong and then let him leave.

The Petitioner testified that he told the officers that he was on parole for a drug related charge, and the police then began searching his person. They made him strip naked in the street. One male officer was making inappropriate jokes to a female officer during this search. The Petitioner said that the police found nothing. Then, shortly thereafter, he heard one officer yell to another to look at the ground. The officer then told him that he was under arrest for something that the officer had seen him throw on the ground.

At trial, a police officer testified that he saw the Defendant throw something on the ground. The Petitioner told Counsel that this was untrue. He told Counsel that he also never threw or picked up any money as the officer had testified. Further, the Petitioner said he had approximately one hundred dollars in his possession at the time of his arrest.

The Petitioner testified that he was never able to tell his version of events to Counsel because they never met for a long enough period of time. Counsel, he said, always cut their meetings short after the Petitioner told him that he was not going to plead guilty.

On cross-examination, the Petitioner conceded that his testimony that he found out the car was broken down the night before his arrest would have differed from Green's testimony, which was that she did not find out about the car being broken down until the morning of the arrest. The State then questioned the Petitioner extensively about what his testimony at trial would have been. The Petitioner testified that both officers were lying when they said they saw him at the back of the car with Davis. The Petitioner said he never went to the trunk of the car. The Petitioner said he told the officers he was there to fix the car, and he did not know why the officers failed to mention that when they testified.

The Petitioner agreed that, after being arrested in this case, he made bond. While on bond, he was re-arrested for another drug offense. He made bond again and was again re-arrested for a third drug offense. The Petitioner said Counsel never informed him that his sentences would run consecutively if he were convicted of all three offenses. Additionally, Counsel never informed him that his sentences would run consecutively to his parole violation conviction.

The Petitioner testified that Counsel brought him the first plea offer of ten years in exchange for the Petitioner's plea of guilty to all of the counts in the indictment. The Petitioner said he did not want to plead guilty to any of the charges because he was not guilty of any of them despite his long history of drug dealing. The Petitioner said Counsel never told him how long his sentence could be if convicted, but the Petitioner also testified Counsel told him that he could receive forty to sixty years if convicted.

The Petitioner said he never told Counsel that Counsel should interview Green. Instead, the Petitioner said Counsel suggested to Green at one court appearance that Green should testify on the Petitioner's behalf and should bring her family members with her. The Petitioner said he did not know that Green would not testify until Counsel failed to call her. The Petitioner also said that he gave Counsel Curtis Strong's full name as a potential witness and that Counsel was lying when he said otherwise. The Petitioner conceded that he did not give Counsel Strong's phone number or address, but he said he thought Counsel would hire an investigator to do so. The Petitioner gave Counsel Black's name and told him that Black was staying at the Trinity Inn at the time of his arrest. The Petitioner denied that he and Counsel ever discussed a theory of the case.

The Petitioner said he wanted to testify on his own behalf at his trial, but Counsel prevented him from so doing. The Petitioner agreed that, when the trial judge asked him if he wanted to testify, he declined and told the trial judge he was freely and voluntarily making this decision. He then said that he never told Counsel he wanted to testify and that he did not testify because Counsel told him if he testified his prior record would be admissible and his co-defendant would testify against him.

On redirect examination, the Petitioner testified he only learned that he could receive a forty to sixty-year sentence between the trial and the sentencing. He thought the maximum he could receive was ten years. Upon questioning by the post-conviction court, the Petitioner said

that he believed the State's offer of ten years was the same as the maximum that could be imposed upon him if he lost at trial. The Petitioner testified that he had pled guilty to cocaine-related offenses on at least three or four prior occasions and that, at that time, the judge entering the plea explained to him that the potential sentence was eight to thirty years or three to fifteen years, depending on the class of the felony offense. He said, however, because of the facts of this case, he thought that he could only receive a ten-year sentence. The Petitioner agreed the trial judges presiding over his prior guilty plea hearings informed him that he would have a permanent conviction on his record from his pleas. He denied that any judge told him the convictions could be used against him in the future if he were convicted of another crime. The Petitioner testified Counsel never told him that the maximum he could receive would be ten years, but Counsel never told him he could get more than ten years either.

Based upon this evidence, the post-conviction court dismissed the Petitioner's petition.

II. Analysis

On appeal, the Petitioner contends Counsel was ineffective for: (1) failing to thoroughly investigate and call certain witnesses; (2) failing to fully advise him of the impact of his criminal record; (3) failing to adequately prepare and represent him at trial.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment.

> Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994). When a petitioner makes a claim of ineffective counsel within the context of a guilty

plea, the petitioner must demonstrate a reasonable probability that, but for counsel's deficiency, the petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Manning v. State*, 833 S.W.2d 635, 637 (Tenn. Crim. App. 1994).

A. Potential Witnesses

The Petitioner contends that Counsel was ineffective for failing to find, investigate, and interview potential witnesses.

The post-conviction court concluded:

> The record reflects that [Counsel] . . . interviewed two out of the four possible witnesses and found their version of the events to be non-credible, not relevant or based on hearsay. Neither of the two witnesses interviewed were present during the drug buy. There was no testimony as to why the two on-the-scene witnesses were not interviewed or even what efforts were made to locate them. The implication from the general testimony was that little, if any, efforts to interview them were made because of the lack of information to contact them.
>
> Tommie Green was the only potential witness who testified at the hearing. The impact of her testimony, had she testified at the trial, would have been to provide Petitioner with a rational and lawful reason to have been at the Trinity Inn. Providing the jury with an alternative explanation for Petitioner's presence at the Trinity Inn would have been of some benefit in all likelihood and would have further advanced the defense strategy to distance Petitioner form his co-defendant. Nevertheless, this testimony alone does not support by clear and convincing evidence that the trial outcome would have been different. After all, Petitioner was convicted [of] facilitation of the actual sale so some distance had already been established to the satisfaction of the jury.
>
> None of the other potential witnesses testified at the hearing. . . . Failure to produce these witnesses at the post-conviction hearing is fatal to his claim for relief on this ground.

The record shows that the Petitioner gave Counsel Curtis Strong's full name but had no contact information for him. He thought that Counsel would find Strong with information contained in the police report. The police report stated that police "detained a male black that had arrived in a plumbing [truck]." This man was released a short time later after police determined he had no involvement in the drug deal. Counsel testified that the Petitioner told him about two potential witnesses, Green and Green's son-in-law. Counsel said the police report referred to a third person, whom he termed a "peripheral mystery person" because no one knew that person's identity. Counsel said the Petitioner never told him of any potential witnesses besides Green and her son-in-law.

We conclude the evidence does not preponderate against the post-conviction court's findings. We first note that the State's theory of the case that the Petitioner had no reason to be at the Trinity Inn other than this drug deal was not known to Counsel before trial. He cannot be held accountable for not presenting witnesses to combat an unanticipated theory. Further, Counsel testified that, in preparing his strategy for defense, he did not argue that the Petitioner was at the Trinity Inn repairing his fiancé's car because he did not think that this disproved the Petitioner's involvement in the drug sale. He interviewed Green and determined much of her testimony was hearsay. Counsel's strategy was to blame the drug transaction on the Petitioner's co-defendant. We conclude the Petitioner is not entitled to post-conviction relief based upon Counsel's failure to call Green as a witness.

Further, we agree with the post-conviction court that, in order for a petitioner to successfully allege ineffective assistance of counsel based upon the failure to call a witness, a petitioner must be able to "produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called." *Black v. State*, 794 S.W.2d, 758 (Tenn. Crim. App. 1990). The Petitioner presented none of the three alleged potential witnesses at his post-conviction hearing. As such, we conclude he is not entitled to relief on this ground.

B. Range of Punishment

The Petitioner next contends that Counsel was ineffective by failing to properly advise him of his correct range of punishment. Further, Counsel erroneously listed the range of punishment on the *Blakely* waiver form, which showed a potential range of sentence lower than that of a Career Offender. The State contends that the Petitioner was not prejudiced by any confusion he had about whether he was a Career Offender because, even had he known as much, he would not have pled guilty.

The post-conviction court found:

> Addressing the issue about Petitioner choosing not to testify at trial, he stated at the hearing that the decision was his, but that he would have likely testified if his prior convictions were inadmissible. These prior convictions were not challenged in a jury-out hearing because [Counsel] was of the opinion that Petitioner never indicated a desire to testify. Contrary to the testimony of Petitioner, [Counsel] said that they discussed the pros and cons of Petitioner testifying before trial and Petitioner elected not to do so. The Court is satisfied that the Petitioner made an informed decision not to testify in his trial.
>
> The understanding Petitioner had of his potential liability if convicted at trial based on his prior record is less clear. Petitioner claims that he was never advised that his exposure if convicted of the Count II indicted offense would be a thirty (30) year sentence as a Career Offender with a release eligibility date of sixty percent (60%). He testified that he would have accepted the ten (10) year

> offer had he known his exposure was this great. [Counsel] testified, on the other hand, that he advised Petitioner on several occasions of his exposure upon conviction and that Petitioner simply did not want to accept the realities of the situation. Additionally, [Counsel] was of the opinion that Petitioner was generally opposed to pleading guilty to a charge when he strongly professed his innocence.
>
> The Court finds Petitioner was not aware of or at least was confused about his potential exposure. For instance, on the morning of trial, Petitioner signed a "Waiver of Jury Determination" form which reflects the range of punishment in Count I to be 10-15 years which is range II, persistent offender status for sale of less than .5 grams of cocaine. In count II the potential 12 to 20 year sentence for Possession with Intent of over .5 grams of cocaine equates to a range II, multiple offender status. Also insightful is Petitioner's response "I do now" at the sentencing hearing when questioned if he understood he was a career offender.
>
> Notwithstanding the shortcomings in their communications of Petitioner's sentencing range for the offenses charged, he has failed to carry his burden that a clear understanding of his potential punishment would have resulted in his pleading guilty. First, Petitioner readily acknowledges his willingness to plead guilty in his previous cases because he was guilty. In this case, he consistently professed his innocence. Second, Petitioner knew that he was facing as much as twenty (20) years, but states that he rejected a five-year offer because he was not guilty. This decision was made despite counsel's advice to take the plea. Third, Petitioner, although maybe not clear on the exact amount of his exposure, had to be aware that his exposure was significantly greater than ten (10) years simply because the range of punishment would have been discussed with him pursuant to guilty pleas to drug offenses entered on at least three (3) previous occasions since enactment of the 1989 Sentencing Reform Act.

The evidence does not preponderate against the post-conviction court's findings. Counsel said that he told the Petitioner on several occasions about his potential exposure and showed him a chart depicting his potential exposure. The Petitioner testified he thought he could receive forty to sixty years if he testified because his co-defendant would testify against him. Further, the Petitioner had pled guilty to similar drug charges on three or four previous occasions and would have been notified then of his potential sentence. It appears that he was aware before trial of his potential sentence. We agree that the *Blakely* waiver form submitted on the Petitioner's behalf misstated the Petitioner's potential sentence; however, the Petitioner clearly testified that he never saw or read this waiver. Therefore, we conclude that this waiver had no effect on his decision to accept the guilty plea offer by the State. Further, any confusion about his sentencing range was not the basis for his refusal to plead guilty. The Petitioner refused to entertain any guilty plea because he said he was innocent and therefore would not be convicted at trial. This was true despite Counsel's attempts to encourage him to plead guilty. Under these

circumstances, the Petitioner has not proven by clear and convincing evidence he is entitled to post-conviction relief.

C. Preparation

Finally, the Petitioner next contends that Counsel failed to adequately prepare and represent him at trial, in part because he did not testify and no witnesses were called on his behalf.

The post-conviction court found:

> Although the trial preparation in this case was not particularly extensive, the facts and legal issues were anything but complex. The court finds the trial preparation to have been adequate under the facts of this particular case. The one shortcoming to the strategy employed is that it did not address the drugs seen dropped by the Petitioner and recovered in his immediate surroundings. Then again, counsel at least argued that the police were mistaken in what they saw. He also pointed out that they could not say what, if anything, transpired between the Petitioner and [co-defendant] Davis. This court cannot second-guess this approach based on the fact of this case. In reality, you sometimes have to play the cards you are dealt even when the deck is simply stacked against you.

We conclude that the evidence does not preponderate against the post-conviction court's findings. Counsel presented no witnesses because he thought there were none that would be favorable to the Petitioner. He determined the Petitioner testifying on his own behalf was not a good idea, and he counseled the Petitioner accordingly, and we will not second guess his decision to counsel the Petitioner accordingly. Further, he thought much of Green's testimony was inadmissible hearsay and found the testimony of her son to not be credible. There were no other witnesses presented by the Petitioner to Counsel or presented by the Petitioner at the post-conviction hearing. We conclude that the evidentiary rulings about which the Petitioner complained do not reflect on Counsel's adequate preparation or his effectiveness in his representation. The Petitioner is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude that the Petitioner is not entitled to post-conviction relief. As such, we affirm the post-conviction court's judgment.

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ROBERT W. WEDEMEYER, JUDGE